Before the
Federal Communications Commission
Washington, D.C. 20554

In Re	)	
	)	
Petition for Declaratory Ruling	)	
and Rulemaking with Respect to	)	
Defining, Predicting, and	)	
Measuring "Grade B Intensity"	)	
for Purposes of the Satellite	)	
Home Viewer Act	)	**RM** 9345

TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS ON PETITION FOR RULEMAKING FILED BY ECHOSTAR COMMUNICATIONS CORPORATION

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TABLE OF CONTENTS

PAGE NUMBER

SUMMARY 1

I. The Echostar Petition is Based on a Fundamental Misunderstanding of the Satellite Home Viewer Act and Its Application by the Courts 4

A. EchoStar's Petition Completely Ignores the Fact That the Satellite Home Viewer Act is a *Copyright* Statute 5

B. The EchoStar Petition Ignores Congress' Decision to Protect the Network/Affiliate Relationship by Creating a *Narrow* Compulsory License 7

1. The Network/Affiliate Relationship is the Backbone of Free, Over-the-Air Broadcasting 7

2. Congress and the Commission Have Consistently Prohibited Multichannel Video Providers From Importing Duplicative Network Programming 9

3. Congress Made the Satellite Compulsory License Narrow To Protect the Network/Affiliate System 10

C. The Satellite Home Viewer Act Is *Not* Intended to Maximize Competition by Satellite With Cable; Indeed, It Generally *Prohibits* Satellite Companies From Competing With Cable 13

D. The EchoStar Petition Completely Misdescribes How the Courts Are Enforcing the Satellite Home Viewer Act 14

1. The Miami and Raleigh Courts Interpret the Term "Grade B Intensity" Identically, to Refer to the Signal Strengths Listed in Section 73.683(a) 14

2. The Miami and Raleigh Courts Issued Different Forms of Relief Because the SHVA Specifically Authorizes Two Alternative Remedies 15

3. The EchoStar Petition Mischaracterizes the Miami Court's Use of Longley-Rice as a Tool for Enforcing SHVA 16

a. By Statute, Satellite Carriers Have the Burden of Proving that Each of Their Customers *Cannot* Receive a Signal of Grade B Intensity 16

b. The Miami Court's Decision to Allow PrimeTime 24 to Serve Households It Has Not Tested Represents a Generous Concession, Not an Unfair Imposition 17

II. Echostar and Other Satellite Carriers Have Grossly Abused the Compulsory License 18

III. Satellite Carriers Aggressively Market Distant Network Signals as a Way to Time-Shift and to Obtain Non-Local Sports and Other Programming 20

a. Time-shifting 21

b. Access to out-of-town sports events 22

c. Ability to receive network programming without use of an antenna. 22

d. Digital format 22

IV. The Miami Court Used Essentially the Same Maps the Commission Has Used to Determine Which TV Stations "Viewers . . . Can Now Receive Over the Air" 23

V. The Commission Has No Authority to Act on Echostar's Suggestion that the Commission (At Some Later Time) Modify the Definition of Grade B Intensity 25

A. Congress Adopted the Specific Definition of Grade B Intensity in Force In 1988, and the FCC Cannot Change the Meaning of Section 119 By Any Action It Takes Today 26

B. The Particular Change in the Definition of "Grade B Intensity" Suggested by EchoStar Makes No Sense 29

VI. There is No Basis for Echostar's Proposal to Rely on Radically Truncated Longley-Rice Propagation Maps 29

A. The Miami Court Has Used Longley-Rice Maps Only As a Way to Permit Satellite Companies to Serve Households as to which the Companies Have Not Met Their Statutory Burden of Proof 29

B. EchoStar's Claim that Standard Longley-Rice Maps Overpredict Actual Availability of Signals is Fallacious 30

C. Actual Test Results Show that Longley-Rice, Run in the Standard Manner, is An Excellent Predictor of Signal Intensity 31

D. Use of "99%" Factors in Running Longley-Rice Is Improper for Technical Reasons 32

VII. Echostar's Proposal to Use Inside Measurements From Unknown Equipment to Measure Outdoor Field Intensity is Flatly Inconsistent With the Statute 32

VIII. To Foster Lawful Competition Between Cable and Satellite, the Commission Should Encourage Enactment of an Appropriate Regulatory Regime for Local-to-Local Satellite Transmissions of Broadcast Stations 35

CONCLUSION 36

SUMMARY

Like the petition filed by its fellow copyright infringer NRTC, the petition filed by EchoStar asks the FCC to gut the Satellite Home Viewer Act ("SHVA") and decimate the protection granted by Congress to local network affiliates against importation of duplicative network programming. And like the NRTC petition, the EchoStar petition is based on a profound misunderstanding about what the SHVA says and how the courts are implementing it.

In crafting a narrow compulsory license for satellite companies -- a strictly limited exception to the broad exclusive rights that copyright owners normally enjoy -- Congress sought to balance two competing objectives. First, it sought to make network programming available to the tiny percentage of the American public, typically in remote rural areas far from broadcast towers, who cannot receive local network affiliates. Second, Congress took pains to ensure that satellite carriers would not invade the service areas of local network affiliates.

The heart of EchoStar's petition is the pretense that although SHVA is part of the Copyright Act, the FCC somehow has the power to rewrite the Act by eliminating the protection that Congress insisted on providing for local network affiliates. The Commission neither can nor should take the radical steps that EchoStar describes, which would have a catastrophic effect on free, over-the-air broadcasting.

EchoStar's principal suggestions do not involve the definition of Grade B intensity itself, but rather the way in which one predicts whether a particular location is likely to receive a signal of Grade B intensity and how one measures whether such a signal is present. Neither of EchoStar's proposals is consistent with the Act, and neither has any merit.

First, with regard to the manner of predicting signal intensity: EchoStar's petition assumes, falsely, that the courts have treated the Longley-Rice propagation model as a method of making final determinations about which households may lawfully be served. That is not so: the issue of whether a particular household receives a signal of Grade B intensity can be resolved only by actual measurements, not by predictions. As part of its equitable discretion under the Copyright Act in fashioning relief against willful copyright infringers, however, the CBS v. PrimeTime 24 court has employed the Longley-Rice model to permit the infringers to serve certain households (those predicted to be unlikely to receive a Grade B signal) without having to measure their signal intensity in advance. In doing so, the Court noted that empirical testing of randomly selected homes showed that Longley-Rice, run in the standard manner specified by the FCC in Office of Engineering & Technology Bulletin 69, is very accurate in predicting actual signal intensity. And to the extent that Longley-Rice predictions are inaccurate, PrimeTime 24 is free to serve any household as to which it meets its burden of proof by conducting a signal intensity test, without regard to what Longley-Rice may predict.

In other words, the Court is simply using Longley-Rice as a tool to permit an infringer to serve certain households without being required to meet its statutory burden of proof. The Commission lacks the authority to countermand the judgment of a federal district court about how to exercise its discretion in enforcing the Copyright Act.

Even if the Commission had such authority, EchoStar's position would be nonsensical. EchoStar's position about methods of predicting Grade B intensity is this: the FCC's standard method of running the Longley-Rice propagation model must be abandoned in favor of an

unprecedented and aberrational method designed to drastically shrink the predicted coverage areas of local stations. If applied by the courts, the EchoStar approach would result in chaos and confusion for consumers: millions of households that actually do receive Grade B intensity signal would be erroneously predicted not to do so; but these households would ultimately have their service terminated in any event, because the SHVA bases eligibility not on predictions of service but on actual signal intensity.

EchoStar offers not a particle of empirical data to support its claim that Longley-Rice -- run in the standard manner specified by the FCC -- results in significant overprediction of actual signal intensity. Broadcasters, by contrast, have conducted extensive empirical testing of the Longley-Rice model run in the standard way, and found it to be remarkably accurate in predicting actual field intensity measurements. Even if (contrary to fact) the Commission had the necessary authority, therefore, EchoStar's proposal should be rejected on the merits.

EchoStar's other proposal is that the Commission establish a new regime supposedly designed to determine whether particular households are in fact capable of receiving signals of Grade B intensity from their local network affiliates. EchoStar's proposals are totally inconsistent with both the language and the purpose of SHVA. Most notably, EchoStar would have the Commission endorse the false notion that one can measure the signal intensity present above a rooftop by taking measurements at a household's TV set, no matter how ancient or corrupted the household's antenna or transmission line. (EchoStar does even not attempt to suggest how to conduct a measurement at a household that, like many, has no rooftop antenna.) EchoStar's proposal for inside measurements has nothing to do with the applicable statutory

standard, which is whether a household is capable of receiving a signal of Grade B intensity with a outdoor rooftop antenna.

At bottom, the EchoStar petition, like the NRTC petition, invites the Commission to repeal the SHVA in favor of a statute that EchoStar would prefer Congress to have enacted. No agency has the ability to rewrite a federal statute, however, and to do so would place the over-the-air network/affiliate system in extraordinary jeopardy. The Commission should reject EchoStar's invitation to error.

I. THE ECHOSTAR PETITION IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THE SATELLITE HOME VIEWER ACT AND ITS APPLICATION BY THE COURTS

In enacting the Satellite Home Viewer Act, Congress created a strictly limited compulsory license under the Copyright Act to achieve two policy objectives: (a) making network programming available to a tiny fraction of the population (typically in remote rural areas) that is unable to receive local stations, while (b) rigorously protecting local network affiliates from duplication of their programming in homes that can receive local stations.[1/] Congress narrowly limited the compulsory license because a broad license would sabotage free, over-the-air broadcasting and subvert Congress' (and the FCC's) longstanding policy of localism in broadcasting. And even aside from Congress' pointed directive about the narrowness of the

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1/ In these Comments, we use the term "network affiliate" to refer both to stations owned and operated by ABC, CBS, Fox, and NBC and to stations owned by others that are affiliated with the networks. (In Washington, D.C., for example, WRC (NBC-Channel 4) is owned and operated by the NBC network, while WJLA (ABC-Channel 7) is owned by a third party.)

SHVA license, it is long settled that compulsory licenses -- as exceptions to the general rule that copyright owners enjoy exclusive rights in their works -- are construed narrowly.

To accomplish its purposes, Congress adopted a simple, objective test for determining eligibility under the SHVA. A crucial part of Congress' method of balancing the two policy objectives described above was its choice of a particular objective test: the "Grade B" signal strengths then published by the FCC in 47 C.F.R. § 73.683(a).

EchoStar asks the FCC to overturn the policy decisions made by Congress and destroy the protection that Congress provided for local stations. The Commission has no authority to rewrite the SHVA in the manner urged by EchoStar; and even if it the necessary authority, EchoStar's proposals would amount to disastrously bad policy.

A. EchoStar's Petition Completely Ignores the Fact That the Satellite Home Viewer Act is a *Copyright* Statute

Although EchoStar's petition for rulemaking all but ignores the fact, the Satellite Home Viewer Act is part of the Copyright Act, not part of the Communications Act. That fact is profoundly significant.

Under the Copyright Act, copyright owners generally enjoy the exclusive right to exploit their works, and to authorize (or decline to authorize) others to do so. 17 U.S.C. § 106. The Satellite Home Viewer Act creates a narrow exception to that principle: it authorizes satellite

carriers to deliver ABC, CBS, Fox, and NBC programming to dish owners, but only those in "unserved households."

The special compulsory license in Section 119 of the Copyright Act thus gives satellite carriers an extraordinary privilege: to retransmit and sell to dish owners copyrighted television programming created or purchased by the ABC, CBS, Fox, and NBC networks and their affiliates. Satellite companies have no role in creating this programming, and need not purchase it in the marketplace. Congress' sensible decision to limit that privilege to "unserved households" was intended to ensure that satellite carriers would not jeopardize the network/affiliate system by duplicating the network programs offered by local stations.

Just as EchoStar ignores the fact that the SHVA is a copyright statute, it also neglects to mention the long-settled principle of narrow construction of compulsory licenses. As both the courts and the Copyright Office have long recognized, "[c]ompulsory licenses are limitations to the exclusive rights normally accorded to copyright owners," and therefore "must be construed narrowly . . . ." Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991); see Fame Publishing Co. v. Alabama Custom Tape, Inc., 507 F.2d 667, 670 (5th Cir.), cert. denied, 423 U.S. 841 (1975) (compulsory license "must be construed narrowly, lest the exception destroy, rather than prove, the rule").

B. The EchoStar Petition Ignores Congress' Decision to Protect the Network/Affiliate Relationship by Creating a *Narrow* Compulsory License

1. The Network/Affiliate Relationship is the Backbone of Free, Over-the-Air Broadcasting

Over the past 50 years, Congress and the Commission have worked to foster the development of a national system of free over-the-air broadcast stations to serve local communities around the country. Thanks to these policies, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Victoria, Texas (with only 28,000 television households), Alpena, Michigan (with only 17,000 television households), and Glendive, Montana (with only 5,000 television households).

The success of the over-the-air television broadcast system is largely the result of the partnership between broadcast networks and affiliated television stations. The programming offered by network affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. See Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994) (Turner I); Communications Act of 1934 § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, "nearly 40 percent of American households still rely on broadcast stations as their exclusive source of television programming." Turner I, 512 U.S. at 663 (emphasis added).

The network/affiliate system provides a service that is very different from the nonbroadcast networks distributed by satellite companies and cable systems. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. H.R. Rep. 100-887, pt. 2, at 19-20 (1988) (describing network/affiliate system, and concluding that "historically and currently the network-affiliate partnership serves the broad public interest."). Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a customized blend of programming suited to its community -- in the Supreme Court's words, a "local voice." For example, stations in coastal areas provide vitally needed information to viewers about potential hurricanes -- such as coverage today of Hurricane Georges -- while stations in Montana do the same about impending blizzards. Similarly, during the past summer, stations in Florida provided a tremendous public service by tracking and providing constant coverage of the disastrous spread of fires in that state.

A key source of revenues for local network affiliates is the sale of local advertising time during network programs. Because network programs often command large audiences, the sale of local advertising slots during these programs is one of the most important ways in which stations earn revenues to stay in business and fund their local news, weather, and public affairs programming. When local viewers watch network programming from a distant source, therefore, the economics of local network affiliates are fundamentally undermined.

2. Congress and the Commission Have Consistently Prohibited Multichannel Video Providers From Importing Duplicative Network Programming

As NAB has explained in its Preliminary Opposition to the similar petition filed by the National Rural Telecommunications Cooperative, the policy of protecting local network affiliates from importation of duplicative network programming has been a bedrock part of federal communications policy. To prevent cable systems from harming local network affiliates, for example, the Commission has, since the 1960's, imposed network nonduplication rules that generally bar cable systems from importing distant network affiliates. See 47 C.F.R. § 76.92-76.97 (1996). The Commission significantly strengthened those rules in 1988 to enhance the protection provided to local network affiliates.[2/]

Congress has expressly endorsed the Commission's policy of protecting network affiliates from importation of duplicative network programming. In enacting the Telecommunications Act of 1996, for example, Congress specifically directed that the network nonduplication rules applicable to cable also be applied to a new type of multichannel video provider: open video system ("OVS") operators. Telecommunications Act of 1996, Pub. L. No. 104-104, § 653(b)(1)(D). In crafting SHVA, Congress found a new way to implement these same bedrock policy objectives.

2/ See Report and Order, In Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, Gen. Docket No. 87-24, ¶ 117, 3 FCC Rcd. 5299, 5319 (released July 15, 1988), aff'd, 890 F.2d 1173 (D.C. Cir. 1989).

3. Congress Made the Satellite Compulsory License Narrow To Protect the Network/Affiliate System

EchoStar's petition assumes that Congress' sole purpose in enacting the Satellite Home Viewer Act was to maximize satellite delivery of network programming, without regard to whether satellite delivery would duplicate the programming already provided by local stations. See EchoStar Pet. at vi, 20, 22, 23. Congress had no such purposes. Its actual goals were to authorize satellite delivery to the small number of households that are genuinely "unserved" by local network affiliates, *while also ensuring that other households did not receive duplicative network programming by satellite*. See Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100-887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship") (emphasis added).

In particular, when Congress crafted a compulsory license for satellite carriers in 1988, it took pains to ensure that the new compulsory license would not interfere with the network/affiliate system. Although Congress imposed no geographical constraints on retransmission of independent stations -- called "superstations" in Section 119[3/] -- it carefully limited delivery of network affiliates to "unserved households." That is, Congress prohibited satellite carriers from delivering network affiliates to any household that either is capable of receiving a signal of Grade B intensity (as defined by the FCC) of a local network affiliate, or

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3/ In 1988, Congress did direct the Commission to investigate the feasibility of imposing syndicated exclusivity protection on satellite carriers.

that has subscribed within the previous 90 days to a cable system. See 17 U.S.C. § 119(d)(10) (definition of "unserved household").

Congress understood and intended that only a tiny fraction of American television households would qualify as "unserved households." In hearings in 1988, one of the largest satellite carriers testified that "we all agree that approximately 1 percent or approximately 1 million is the figure" for white area households.[4/] The House Judiciary Committee Report on SHVA confirms that only a "small percentage" of television households would be eligible to receive network programming by satellite. H.R. Rep. No. 100-887, pt. 1, at 18 (1988). And the Commission itself, after collecting comments from the carriers and other industry groups, concluded that only "800,000 to 1 million households" are unable to receive local network affiliates. In Re Inquiry into the Scrambling of Satellite Television Signals and Access to those Signals by Owners of Home Satellite Dish Antennas, Gen. Docket 86-336, Second Report and Order, ¶ 64, 3 FCC Rcd. No. 5 1202, 1209 (released March 11, 1988).

As reflected in the text of the statute, Congress expected satellite carriers to strictly limit themselves to this small group of genuinely "unserved" households. Congress considered the restriction to "unserved households" so vital that in crafting penalties for violation of that restriction, it required courts to put a satellite carrier out of the business of retransmitting network signals in the area if the court found that the carrier had engaged in a pattern or practice of

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4/ Satellite Home Viewer Copyright Act: Hearings on H.R. 2848 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice, 100th Cong. 289 (1988) (Testimony of Brian J. McCauley, President, Netlink USA).

violating the "unserved household" limitation. See 17 U.S.C. § 119(a)(5)(B) (1998). And when Congress extended SHVA in 1994, it was so concerned about abuse of the compulsory license by satellite carriers that it expressly required them -- not broadcasters -- to bear the burden of proof about whether each customer is capable of receiving signals of Grade B intensity from local stations.

Remarkably, in a 30-page petition devoted entirely to the SHVA, EchoStar mentions protection of the network/affiliate relationship only once -- and then in a footnote (Pet. at 21 n.45). After briefly mentioning that fundamental congressional objective, EchoStar makes the outrageous suggestion that the Commission can ignore it. Id. That suggestion is a blatant invitation to the Commission to act unlawfully. First, protection of the network/affiliate relationship is built into the statute itself, which the Commission is not free to change. Second, if the Commission had any authority in this area -- which it does not -- it could not take any action that would sabotage Congress' repeatedly and emphatically expressed intent to protect network affiliates from importation of duplicative programming. As the D.C. Circuit explained in rejecting an effort by the Commission to rewrite another statute, Congress here "intended a specific scheme for [retransmission of network affiliates]," relying on "[a] balance achieved after a careful compromise." Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1520 (D.C. Cir. 1995), quoting AT&T v. FCC, 487 F.2d 865, 880 (2d Cir. 1973). The Commission "is not free to circumvent or ignore that balance. Nor can the Commission in effect rewrite this statutory scheme on the basis of its own conception of the equities . . . ." Id.

C. The Satellite Home Viewer Act Is *Not* Intended to Maximize Competition by Satellite With Cable; Indeed, It Generally *Prohibits* Satellite Companies From Competing With Cable

As discussed above, Congress enacted the Satellite Home Viewer Act to achieve two purposes: making network programming available to the small number of truly unserved households, while protecting local network affiliates against importation of duplicative programming. Congress did not enact the Satellite Home Viewer Act to maximize competition between cable and satellite, and it would be rewriting history to pretend that it did.[5/] To the contrary, Congress recognized that there is a critical difference between cable and satellite: cable systems deliver local network affiliates, while satellite carriers generally deliver distant network stations.[6/] Because Congress sought to encourage reception of local network affiliates, it forbade satellite carriers to deliver network programming to homes that had recently subscribed to cable. 17 U.S.C. § 119(d)(10)(B). Congress' reason for doing so was to deter viewers from canceling cable service (which provides local stations) in favor of satellite service (which typically does not).[7/]

5/ Moreover, it is difficult to fathom the claim that allowing satellite carriers to deliver distant signals willy-nilly will help them to compete with cable. What the satellite industry has repeatedly said is that some customers turn away from satellite because they want local signals included as part of the package. Only a local-to-local statute -- not a misreading of the narrow existing compulsory license for unserved households -- can address any legitimate competitive concern of the satellite industry.

6/ We urge the Commission to support appropriate local-to-local legislation to make it possible for satellite carriers lawfully to deliver local television stations to their local viewers. See pp. 35-36 below.

7/ See H.R. Rep. 100-887, pt. 1, at 27 (1988) ("The purpose of the [90-day-no-cable] (continued...)

Thus, far from seeking to give satellite companies every advantage in competing against cable, as EchoStar and its allies imply,[8/] Congress expressly designated cable as the preferred delivery system for network stations precisely because cable delivers *local* stations. There could hardly be a clearer indication that -- contrary to the misleading claims made by the satellite industry -- SHVA is not intended to maximize competition between satellite and cable, and particularly not competition through blatant copyright infringement.

D. The EchoStar Petition Completely Misdescribes How the Courts Are Enforcing the Satellite Home Viewer Act

1. The Miami and Raleigh Courts Interpret the Term "Grade B Intensity" Identically, to Refer to the Signal Strengths Listed in Section 73.683(a)

EchoStar repeatedly claims that the federal courts in Miami and Raleigh have issued inconsistent decisions about the meaning of "Grade B intensity." That is completely wrong. The two federal courts are in full agreement that the phrase "over-the-air signal of Grade B intensity" in Section 119 refers to the specific signal strengths (such as 47 dBu for low-VHF channels) specified in the Commission's rules at 47 C.F.R. § 73.683(a). See May 13 Order, CBS Inc. v. PrimeTime 24, at 13-17 (Miami case); Memorandum Opinion, ABC, Inc. v. PrimeTime 24, at

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7/ (...continued)
requirement is to ensure that households will not cancel their cable subscriptions in order to qualify as 'unserved households' eligible to receive a network station [by satellite].").

8/ See H.R. Rep. 100-887, pt. 1, at 27 (1988) ("The purpose of the [90-day-no-cable] requirement is to ensure that households will not cancel their cable subscriptions in order to qualify as 'unserved households' eligible to receive a network station [by satellite].").

11-19 (July 16, 1998). EchoStar's effort to suggest that there is some "conflict" between the two courts is nonsense.

2. The Miami and Raleigh Courts Issued Different Forms of Relief Because the SHVA Specifically Authorizes Two Alternative Remedies

EchoStar is also wrong in suggesting that the differing forms of relief granted by the Miami and Raleigh courts reflect an inconsistent application of the statute. To the contrary, the different forms of relief granted by the two courts simply reflect the fact that the Copyright Act offers plaintiffs a choice of seeking relief for "individual violations" or for a "pattern or practice" of violations. Compare 17 U.S.C. § 119(a)(5)(A) (1998) (individual violations) with 17 U.S.C. § 119(a)(5)(B) (1998) (pattern or practice).

In the Miami litigation, the plaintiffs have thus far asked the Court to grant relief only under the "individual violations" provision of SHVA, 17 U.S.C. § 119(a)(5)(A) (1998) . The Court has therefore used its discretion to tailor a form of relief that permits the defendant to continue to provide network programming to certain households, even though the defendant has engaged in egregious violations of the Copyright Act.

In the Raleigh litigation, by contrast, the plaintiff sought -- and has been granted -- relief under the "pattern or practice" provisions of SHVA. When a Court finds that a satellite carrier has engaged in a pattern or practice of violations, it must prohibit the satellite carrier from engaging in any further retransmissions of the network programming in question (e.g., ABC programming) within the area in which the pattern or practice has occurred. 17 U.S.C.

§ 119(a)(5)(B) (1998). When a satellite carrier has committed a pattern or practice of violations in a local area, the Court must order the satellite carrier to cease delivering the network in question within the station's local market, which means the station's FCC-predicted Grade B contour.[9/]

In the Raleigh case, the Court found that PrimeTime 24 had indeed engaged in a pattern or practice of violating the Satellite Home Viewer Act. As a result, the Raleigh court has, as the Act requires, prohibited PrimeTime 24 from distributing ABC programming anywhere within the Grade B contour of the ABC station in question, WTVD. See August 19 Order, ABC, Inc. v. PrimeTime 24, at 2.

There is nothing inconsistent about the Miami and Raleigh decisions, each of which faithfully implements the requirements of SHVA. EchoStar's repeated description of the decisions as inconsistent is disingenuous.

3. The EchoStar Petition Mischaracterizes the Miami Court's Use of Longley-Rice as a Tool for Enforcing SHVA

a. By Statute, Satellite Carriers Have the Burden of Proving that Each of Their Customers *Cannot* Receive a Signal of Grade B Intensity

Not once in its Petition does EchoStar mention a crucial aspect of SHVA: that satellite companies are expressly required *by statute* to bear the burden of proving that each of

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9/ See Satellite Home Viewer Act of 1994 H.R. Rep. 103-703, at 15 (1994) ("[F]or purposes of establishing a pattern or practice violation carried out on a local basis under § 119(a)(5)(B), the only relevant area is the network station's predicted Grade B contour.").

their customers is incapable of receiving a signal of Grade B intensity. See 17 U.S.C. § 119(a)(5)(D) (1998).

Congress' explicit placement of the burden of proof provision is extremely significant. It means that satellite carriers must provide objective evidence that each of their customers is unserved: both the Miami and the Raleigh courts have rejected PrimeTime 24's disingenuous claim that it can "test" the presence of Grade B intensity by asking viewers whether they get an "acceptable" picture over the air.

b. The Miami Court's Decision to Allow PrimeTime 24 to Serve Households It Has Not Tested Represents a Generous Concession, Not an Unfair Imposition

As the ABC, Inc. court has held, to meet its burden of proof that a particular household is unserved, a satellite carrier must conduct a signal intensity test at each subscriber's home. See Memorandum Opinion at 13-18, ABC, Inc. v. PrimeTime 24, July 16, 1998. Congress clearly contemplated that satellite carriers would in fact carry out such site measurements. See H.R. Rep. 103-703, at 13 ("[Grade B intensity] is an objective test accomplished by actual measurement.") (emphasis added); S. Rep. 103-407, at 9 (1994) ("This objective test [Grade B intensity] can be accomplished by actual measurement.") (emphasis added).

In the Miami case, the Court bent over backwards to allow PrimeTime 24 to serve subscribers that it had not tested and as to which it had therefore not met its burden of proof. Specifically, in fashioning a preliminary injunction, the Court permitted PrimeTime 24 to deliver

network programming to any household predicted by Longley-Rice (run in the standard manner) not to receive a signal of Grade B intensity, provided that the household meets the other applicable legal requirements. July 10 Supplemental Order, ¶ 3.[10/]

The Miami court thus used Longley-Rice in a manner that helps satellite carriers by allowing them to serve customers as to which they have not met their burden of proof. And contrary to the false impression that EchoStar repeatedly tries to create, the CBS court also permits PrimeTime 24 to serve any household that cannot receive a signal of Grade B intensity, even if Longley-Rice predicts that the household is served. All PrimeTime 24 needs to do is perform a signal intensity test in the manner specified by the Court; if the test shows that the household cannot receive a signal of Grade B intensity, PrimeTime 24 is free to deliver network programming to that household. See July 10 Supplemental Order, ¶ 3.

II. ECHOSTAR AND OTHER SATELLITE CARRIERS HAVE GROSSLY ABUSED THE COMPULSORY LICENSE

For ten years, the satellite industry (including EchoStar since its inception a few years ago) has consciously and lawlessly abused the narrow compulsory license granted by the SHVA. The abuse started in 1998, just after Congress expressly rejected satellite industry proposals to make eligibility depend on self-reporting about picture quality, and instead adopted a completely objective, signal intensity standard. Rather than complying with the law, the satellite industry -- including EchoStar when it began its small-dish business -- ignored the statute, and instead

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[10/] Of course, if a station tested such a household and showed that it does receive a signal of Grade B intensity, the carrier would be required to terminate service to that household.

employed the same sham standard ("do you get an acceptable picture") that Congress had condemned. By using that improper standard, EchoStar and other satellite companies signed up enormous numbers of unlawful subscribers, many in urban and suburban areas in which there can be no doubt that subscribers receive Grade B -- and often Grade A -- intensity signals.

After years of trying to obtain compliance through negotiations, broadcasters were finally forced to sue the largest satellite carrier, PrimeTime 24, which provided distant network signals to DirecTV, EchoStar, and many other distributors.[11/] Two courts have now condemned the lawless pattern of infringements in which PrimeTime 24 and its distributors (including DirecTV, NRTC, and EchoStar) have engaged.

First, the United States District Court for the Southern District of Florida has determined, in granting plaintiffs' motion for a preliminary injunction, that PrimeTime 24 and its distributors such as EchoStar have grossly violated the limitations imposed by the Copyright Act. Here are some of the Court's findings:

- "There are a variety of reasons, unrelated to being an 'unserved household,' why a customer might sign up for PrimeTime 24." (May 13 Order at 20.)
- "Plaintiffs' evidence indicates that PrimeTime 24 is broadcasting copyrighted network programming to hundreds of thousands of subscribers who receive a signal of grade B intensity as defined by Congress." (May 13 Order at 29)
- "Th[e] evidence demonstrates that PrimeTime 24 knew of the governing legal standard, but nevertheless chose to circumvent it." (May 13 Order at 29.)

11/ Broadcasters reached a settlement several months ago with two other satellite carriers, Primestar and Netlink. The agreement uses Longley-Rice maps to establish presumptive served ("red light") and presumptively unserved ("green light") areas. Those presumptions can be overridden by actual test results.

- "PrimeTime 24 cannot create its own definition of the term 'unserved household' and then supply its services to anyone who fits within that definition." (May 13 Order at 30 n.14.)

- "[A] company cannot build a business on infringements and then argue that enforcing the law will cripple that business." (May 13 Order at 33.)

Second, in a case against PrimeTime 24, brought by ABC, Inc. in North Carolina over retransmission of ABC programming in the Raleigh-Durham area, the Court granted ABC's motion for summary judgment. The Court found that "no reasonable fact finder could fail to find that PrimeTime 24's actions constitute a pattern or practice of statutory violation. Although PrimeTime has over 11,000 subscribers in the Raleigh-Durham market, it can show that of these only five meet SHVA's criteria for eligibility." Memorandum Opinion, ABC, Inc. v. PrimeTime 24 (July 16, 1998), at 27. The Court pointed out that even after the lawsuit was filed, PrimeTime 24 signed up more than 200 new subscribers in towns less than seven miles from the local ABC station's broadcast tower. Id. at 25-26.

III. SATELLITE CARRIERS AGGRESSIVELY MARKET DISTANT NETWORK SIGNALS AS A WAY TO TIME-SHIFT AND TO OBTAIN NON-LOCAL SPORTS AND OTHER PROGRAMMING

Because they know that the market for "unserved households" is very small, satellite carriers aggressively promote other benefits of its service to the public and to satellite retailers. For example, one of PrimeTime 24's recent advertisements illustrates its cynical strategy: under the headline "Everyone Watches Television. Some Watch When They Choose," PrimeTime 24 promotes use of its service to watch network programs earlier or later than they are available

locally. Another PrimeTime 24 advertisement promotes use of PrimeTime 24 to get "All the Football You Need," including more than 100 games from various cities. These "benefits," of course, have nothing to do with living in an unserved household.

The satellite industry's motivation for selling to "served" households -- maximizing its (unlawful) profits -- is thus easy to see. From the viewers' perspective, there are a number of reasons -- totally unrelated to living in an "unserved household" -- why viewers pay to receive network programs by satellite:

a. Time-shifting: PrimeTime 24 and EchoStar have both East Coast and West Coast feeds. As a result, satellite subscribers have a range of options in viewing network programming that are not available to them if they watch their local stations. For example, subscribers on the West Coast can watch network programs such as "Ally McBeal" (Fox), "Touched by an Angel" (CBS), "E.R." (NBC), and "Dharma & Greg" (ABC) three hours earlier by watching East Coast network affiliates. Similarly, PrimeTime 24 subscribers in the Mountain Time Zone can watch the David Letterman show at 9:30 p.m. local time (from East Coast stations), at 10:30 p.m. local time (from their local CBS station), or at 11:30 local time (from a West Coast station by satellite).

b. Access to out-of-town sports events: Network affiliates carried by PrimeTime 24 provide viewers with sports events that are not televised by their local stations. By retransmitting Fox and CBS stations (or a special nonbroadcast channel, FoxNet) to viewers across the United States, for example, satellite companies make available many NFL games that